SUPREME COURT OF APPEALS OF VIRGINIA.

CHESAPEAKE & O. RY. CO. *v.* RUCKMAN.

Nov. 21, 1912.

[76 S. E. 278.]

1. Carriers (§ 207*)—Carriage of Live Stock—Contract—Special Agreement.—Where a shipper notified a railroad company that he desired to make a certain shipment of cattle, and stated the time and place at which he wished cars placed for their receipt, together with the date at which he wished them to arrive at their destination, and the reason therefor, a compliance with his request by the furnishing of cars and the consequent shipping of the cattle established a special contract for the delivery of the stock on the day agreed upon.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 129-239; Dec. Dig. § 207.*]

2. Carriers (§ 207*)—Carriage of Freight—Special Contracts.—The provisions of special contracts for the carriage of freight must, like those of other contracts, be complied with, where they are not contrary to public policy or violative of statutory provisions, and the exercise of reasonable diligence will not excuse a failure to carry them out.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 129-239; Dec. Dig. § 207.*]

3. Contracts (§ 245*)—Oral Agreement Superseded by Written.—Contracts in writing supersede preceding conflicting oral agreements; but the written agreement must have been freely and understandingly entered into, and the position of the parties must not have been altered in carrying out the preceding unwritten contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1129, 1130; Dec. Dig. § 245.*]

4. Carriers (§ 68*)—Special Agency—Carriage of Stock—Bills of Lading.—A drover, who drove cattle to a station for loading, was at best only a special agent of the shipper, and, if authorized to sign bills of lading at all, had no authority to sign bills which did not embody the provisions of an oral contract, previously entered into between the shipper and the agent of the carrier, in regard to such shipment, so that the oral contract was not merged into, superseded by, or in any way affected by bills of lading signed by such drover.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 148, 194, 207-209, 216; Dec. Dig. § 68.*]

5. Carriers (§ 218*)—Carriage of Stock—Contract—Failure to Deliver as Agreed—Notice of Claim for Damages.—Where shipments of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

cattle were from a point in West Virginia to points in Pennsylvania and New Jersey, made by a resident of Virginia, so that it would be unreasonable to believe that the shipper could receive statements from commission merchants and investigate the facts sufficiently to determine whether he had a just ground for complaint, within 5 days, as required by bill of lading, a submission of notice within 30 days was sufficient to preserve the shipper's rights.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 932-949; Dec. Dig. § 218.*]

6. Carriers (§ 229*)—Contract of Carriage—Breach—Damages—"Drift."—In an action for damages to cattle from a failure of a carrier to deliver them within the time specified in the contract of shipment, an item of "drift" or shrinkage, which follows every shipment of cattle, was properly allowed as damages, but only to an amount in excess of the usual "drift" between the two shipping points.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 930, 963, 964; Dec. Dig. § 229.*]

Error to Circuit Court, Augusta County.

Four actions, heard as one case, by D. G. Ruckman against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

J. M. Perry, of Staunton, for plaintiff in error.
Landes & East, of Staunton, for defendant in error.

HARRISON, J. The plaintiff, D. G. Ruckman, instituted four separate suits in the circuit court of Augusta county against the defendant railway company to recover damages for the alleged negligence of the defendant in failing to deliver four shipments of cattle in time for a certain market. The four cases were, on motion of the defendant, heard together as one case, and upon a demurrer to the evidence by the defendant a single judgment was rendered in favor of the plaintiff for the damages ascertained by the jury.

[1] These shipments were made by the plaintiff from Bartow, W. Va.—three of them to Jersey City, N. J., and one to York, Pa. The defendant company contends that no special contract for the delivery of the cattle was either alleged or proven, and that it was only under obligation to use ordinary diligence to deliver them in a reasonable time. The allegations of the declaration are that the said live stock was shipped by and with the knowledge and consent of the defendant, and as its special instance and request, for sale on Friday's market

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

next after the shipment, and that the damage resulted from the defendant's default in not delivering the cattle in time for that market.

The evidence sustains these allegations. The plaintiff testifies that in each instance he notified the defendant that he desired to make the shipment; that he stated the time and place at which he wished cars placed for the receipt of the cattle, and named the date on which he wished them to arrive at their destination, and the reason therefor; and that in compliance with his request the transportation was provided and the cattle went forward.

We are of opinion that the allegations of the declaration and the proof sustaining them establish a special contract for the delivery of the cattle on the day agreed upon, which the defendant was under obligation to comply with.

The facts in this case are much stronger in favor of a special contract than in N. P. R. Co. *v.* Am. Trading Co., 195 U. S. 439, 25 Sup. Ct. 84, 49 L. Ed. 269, where the court held that a special agreement resulted from the acceptance of freight to be forwarded promptly and by the earliest possible steamer, coupled with a statement made to the carrier that it was of vital importance that the freight be transported in accordance with those directions.

[2] Special contracts for the transportation of freight are like other contracts. Their provisions must be complied with, where they are not contrary to public policy or violative of statutory provisions; and, when they are not complied with, it is no answer to say that reasonable diligence was used to carry them out.

[3] The defendant further contends that, if a special contract for the shipment of these cattle once existed, it was superseded by and merged into a written contract afterwards made and known as bills of lading.

In 6 Cyc. 428, it is said: "If, however, there is a special contract, so far as it is valid it will determine the rights and liabilities of the parties. Moreover, the contract may be in parol. A bill of lading is not the only evidence of the terms of a special contract. If, however, a written contract has been entered into, it is conclusive as to matters covered thereby; and it is not open to either of the parties to say there was a prior oral agreement inconsistent with the provisions of the writing. Furthermore, there may be a collateral parol agreement as to matters not covered by the bill of lading. The bill of lading or other written contract will not, however, supersede a prior oral agreement, if the written contract is not entered

into until the goods have already been accepted for transportation under the parol agreement."

It is true that contracts in writing supersede preceding conflicting oral agreements, and the authority quoted lays down this elementary proposition. Before the principle can be invoked, however, there must be a conflict. The agreement in writing must have been freely and understandingly entered into, and the position of the parties must not have been altered in carrying out the preceding unwritten contract.

[4] The contracts under consideration were made by the plaintiff with accredited representatives of the defendant company. When made, his cattle were in the mountains, some 20 miles distant from the point of shipment. In accordance with the understanding thus entered into, these cattle were driven to the station and loaded on cars sent there for their reception. The plaintiff himself was not present, this work being done by an ordinary cattle drover. After they were loaded, the railway agent filled out the bills of lading, signed them himself, signed the plaintiff's name to them, and then had the cattle drover countersign them as agent for the plaintiff. The drover had no actual knowledge of the agreement set out in these several bills of lading, or of any others, either written or unwritten. He was told to sign them, was shown where to sign them, and did sign them. At best, he was but a special agent, and no authority was shown, or will be presumed, which vested him with the right to alter the terms of a contract which his principal had previously made. If authorized to sign bills of lading at all, he could only have signed such as embodied the provisions of the oral contract previously entered into, and none other should have been presented to him.

Hutchinson on Carriers, in discussing this question, says: "If, therefore, the shipper, when accepting the bill of lading, has his attention called to its terms, or if he otherwise has notice of its condition, and he expressly or impliedly assents to them, there is no reason why the bill of lading should not control the shipment, although its terms are inconsistent with the oral contract. But, to have this effect, the assent of the shipper to the terms expressed in the bill of lading must have been fairly procured, and if it should appear that an unfair advantage was taken of him, or any means or devices resorted to to keep him from fully understanding its terms, the carrier would not be permitted to avail himself of them. In Railroad Co. *v.* American Trading Co., supra, the court said: 'The railroad company had no power alone to alter that contract, and it could not alter it by simply issuing a bill of lading, unless the

other party assented to its conditions and thereby made a new and different contract.'"

In 6 Cyc. 428, note 57, supported by numerous authorities, it said: "If a railroad company, having received and loaded goods for shipment, thereupon refuses to transport them, unless the shipper will accept the bill of lading embodying stipulations not contemplated when the goods were delivered, such bill of lading will not be binding on the shipper. It must be looked upon as having been executed without consideration, and practically by duress."

We are of opinion that the facts and circumstances of the present case, viewed in the light of the authorities cited, make it clear that the valid oral contract, which was entered into by the defendant with the shipper, was not merged into, superseded by, or in any way affected by the bills of lading which were issued by the railroad company.

[5] It is further contended that there can be no recovery in these cases because notice of the damage sustained was not given within the 5 days provided for in the bills of lading. Limitations of this character are, when reasonable, upheld. The reason for the rule is that it would be a hardship on the carrier for notice of damage sustained to be delayed until the evidence bearing on the subject was lost and the facts could not be ascertained. This court has held that a limitation of 30 days was reasonable, and where it was not waived has upheld and enforced it. Liquid Carbonic Co. *v.* N. & W. Ry. Co., 107 Va. 323, 58 S. E. 569, 13 L. R. A. (N. S.) 753; Atlantic Coast Line R. Co. *v.* Bryan, 109 Va. 523, 65 S. E. 30.

The claims in the case at bar were not made within 5 days as provided by the bills of lading, but were made within 30 days, so that no evidence was lost and no damage suffered by delay. These shipments were from a point in West Virginia to points in the states of Pennsylvania and New Jersey, and they were made by a resident of Virginia. It appears that the plaintiff's commission merchants, promptly upon receipt of the cattle, forwarded statements; but it does not appear when these statements reached the plaintiff. We are of opinion that, under the facts and circumstances of this case, to require statements to be sent from distant states to Virginia, and to require the shipper to investigate the facts sufficiently to determine whether or not he had just ground to complain, all within a period of 5 days, is an unreasonable requirement and cannot be enforced. Such a limitation, under such circumstances, would be a practical denial of justice.

The jury ascertained that the plaintiff had, by reason of the delay in delivery, suffered three items of damage: Extra feed

furnished, loss of sale on the market day for which the cattle were intended, and excess drift or shrinkage incident to the transportation of cattle, resulting from delay in delivery, all aggregating $945.40. These items of damage are supported by the evidence, and were properly allowed.

[6] As to the last item of "drift" or shrinkage, which follows every shipment of cattle, no allowance can be made therefor, unless transportation is unreasonably delayed, or unless delivery is postponed beyond the date contracted for, and then only the drift in excess of that ordinarily experienced can be allowed. The evidence shows that the ordinary and usual drift from Bartow to Jersey City is 80 pounds, and that the drift allowed by the jury was that suffered in excess of 80 pounds, in consequence of the delayed delivery. Such excess loss was properly charged to the defendant. Railroad Co. *v.* Trousdale, 99 Ala. 389, 13 South. 23, 42 Am. St. Rep. 69; Bosley *v.* B. & O. R. Co., 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871.

We find no error in the judgment complained of, and it must be affirmed. Affirmed.

Note.

Liability of Carrier for Damages for Deterioration in Weight of Animals Shipped.—In Richmond, etc., Co. *v.* Trousdale & Sons, 99 Ala. 389, 13 So. 23, cited in the principal case, the court held the carrier liable for all damage that is referable to a negligent prolongation of the transportation, through its natural effect upon the physical condition, or latent vicious propensities, of animals, whereby they are reduced in weight or strength more than they should have been, had prompt carriage and delivery been made, and injure each other in consequence of viciousness aroused by the excess of their confinement beyond the time necessary for transportation and delivery.

CHESAPEAKE & O. RY. CO. *v.* MATHEWS.

Nov. 21, 1912.

[76 S. E. 288.]

1. Evidence (§ 471*)—Opinions—Conclusions or Facts.—In an action by a person injured by stepping into a hole in a passageway from a railroad station across the tracks, the testimony of plaintiff that she was careful in crossing the tracks did not violate the rule against opinion evidence, since it was not a conclusion, but a description of what she did.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

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